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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHAD TIMOTHY YOHAN McCOY,

Defendant and Appellant.

C087664

(Super. Ct. No. 62-148856)

Defendant Chad Timothy Yohan McCoy challenges the trial court's calculation of presentence custody credits following imposition of a consolidated sentence. Defendant contends the trial court failed to include his period of incarceration in the Department of Corrections and Rehabilitation (CDCR) for his conviction in Merced County case No. 17CR-02481 (Merced County case) and failed to include presentence custody credits for the Merced County case in the abstract of judgment. The People concede the issue.

We agree modification of the presentence custody credit award is necessary and will remand the matter for recalculation of credits and amendment of the abstract of judgment. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

A detailed recitation of the crimes underlying defendant's convictions is unnecessary for resolution of this appeal. Suffice it to say that, on November 7, 2016 in the county of Placer, defendant willfully and unlawfully possessed methamphetamine, a controlled substance, for the purpose of sale.

On October 24, 2017, defendant entered a no contest plea in the unrelated Merced County case and was sentenced to 44 months in state prison.¹ The Merced County court awarded defendant 340 days of presentence custody credit (170 actual days plus 170 days of conduct credit) and remanded him to CDCR custody that day.

On June 7, 2018, in the present case, defendant entered a negotiated plea of no contest to felony possession for sale of a controlled substance, methamphetamine (Health & Saf. Code, § 11378), and admitted two prior strike convictions (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i))² in exchange for a stipulated term of four years (to be designated the principal term) and resentencing in the Merced County case to a stipulated consecutive term of two years four months (to be designated the subordinate term) for an aggregate consolidated sentence of six years four months in state prison. The balance of the charges and allegations against defendant were dismissed.

¹ In the Merced County case, defendant pleaded no contest to felon in possession of ammunition (Pen. Code, § 30305) and admitted one prior strike conviction and one prison prior.

² Undesignated statutory references are to the Penal Code.

The court sentenced defendant to an aggregate prison term of six years four months in accordance with the negotiated plea agreement. With regard to presentence custody credit, the court stated defendant had “already been accruing credits” in the Merced County case, noting defendant had accrued 340 presentence custody credits “as of the date that you were sentenced, which is October 24th, 2017.” The court added, “We’ll just confirm that. I’m not adjusting those credits. [CDCR] will take care of that.” With respect to the present case, the court awarded defendant 44 days of presentence custody credit (22 actual days plus 22 days of conduct credit).

Defendant’s counsel requested that presentence custody credit be awarded for time defendant served in the Merced County case as follows: “[Defendant] is here on a [section] 1381 demand, order of production. He arrived here on March 8, 2018, until today for this case. I would ask that he receive presentence time credits towards his Placer County case for that time, because we’re making the Placer County case as his principal term.” Defense counsel added the time would not count towards the Merced County time and “will only count towards the four years that [defendant] is getting in Placer County.” The court denied defendant’s request concluding, “I’m just going to keep credits the way I’ve allocated them. I don’t expect that he’ll get any—there’s any time that he won’t get credit for, but this is how it’s allocated.”

The court’s minute order included 44 days of presentence custody credit in the present case and 340 days of presentence custody credit in the Merced County case. The abstract of judgment included the 44 days of credit in the present case but omitted any award of credits for the Merced County case.

Defendant filed a timely notice of appeal. He did not request a certificate of probable cause.

DISCUSSION

Defendant contends the trial court erred by denying him additional presentence custody credit for the time he served in the CDCR following his conviction and sentencing in the Merced County case. He contends the court further erred by concluding it was the responsibility of the CDCR after resentencing to calculate and award presentence custody credit. Finally, he contends the court failed to include in the abstract of judgment his previous award of presentence custody credits in the Merced County case. The People concede, and we agree.

Section 2900.5 sets out the general rules for awarding presentence custody credit. Subdivision (b) of that section provides: “For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.” Section 2900.5 “imposes on the sentencing court the obligation to determine the number of days of custody and, in those cases to which it expressly applies, conduct credit to which the defendant is entitled, and to enter the credits on the abstract of judgment.” (*People v. Sage* (1980) 26 Cal.3d 498, 508-509; see § 2900.5, subd. (d).)

“The sentence-credit statutes make only one express reference to a sentence modified while in progress. Section 2900.1 provides simply that ‘[w]here a defendant has served *any portion of his sentence* under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified *during the term of imprisonment, such time* shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts.’ ” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 32 (*Buckhalter*).)

Recognizing that *Buckhalter* specifically concerned the modification of a defendant's sentence "as the result of an appellate sentence remand" (*Buckhalter, supra*, 26 Cal.4th at p. 29), the court in *People v. Saibu* (2011) 191 Cal.App.4th 1005 (*Saibu*) held as follows: "[T]he same principles would appear to apply when a trial court resentsences a defendant pursuant to California Rules of Court, rule 4.452. Certainly, a court can be considered to have modified a defendant's original sentence when the court resentsences that defendant to a single aggregate term pursuant to rule 4.452. Therefore, under section 2900.1, which specifies that when a sentence is modified while in progress, the 'time' already served 'shall be credited upon any subsequent sentence [the defendant] may receive upon a new commitment for the same criminal act or acts,' 'the trial court should, 'in its new abstract of judgment, . . . credit him with all *actual* days he had spent in custody, whether in jail or prison, up to that time' (*Buckhalter, supra*, 26 Cal.4th at p. 37)." (*Saibu*, at p. 1012.)

Here, pursuant to defendant's negotiated plea agreement, the parties stipulated that the sentence in the current case would be designated the principal term, defendant would be resentedenced in the Merced County case (in which his previously imposed sentence was already in progress), the sentence in the Merced County case would be designated the subordinate term, and the sentences in both cases would be aggregated. In accordance with the stipulated agreement, the court sentenced defendant to an aggregate term of six years four months in state prison, which was comprised of the sentence in the present case and the new sentence in the Merced County case. Having modified defendant's Merced County sentence already in progress, the court had a duty to determine the number of actual days defendant served in CDCR custody in the Merced County case from October 24, 2017 (the date he was remanded to CDCR custody) until the date of resentencing, to allocate credits to the respective principal and subordinate terms, and to include the appropriate credits, including defendant's previously awarded Merced County

credits, in the abstract of judgment. (§§ 2900.1, 2900.5, subd. (d); *Saibu, supra*, 191 Cal.App.4th at p. 1012.) The court’s failure to do so was error.

We will remand this matter with instructions to the trial court to recalculate and allocate presentence custody credits on both the principal and subordinate terms, including the actual days defendant spent in CDCR custody pursuant to his sentence in the Merced County case, and to include the recalculated credits in the amended abstract of judgment.

DISPOSITION

The matter is remanded to the trial court with directions to recalculate defendant’s presentence custody credits in accordance with this opinion, and to prepare an amended abstract of judgment and forward a certified copy to the CDCR. In all other respects, the judgment is affirmed.

BUTZ, Acting P. J.

We concur:

DUARTE, J.

RENNER, J.